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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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M & M INSTALLATIONS, INC.,

Plaintiff and Appellant,

v.

COOK BROWN et al.,

Defendants and Respondents.

C057688

(Super. Ct. No. 05AS002951)

In this transactional malpractice appeal by M & M Installations, Inc. (M&M or plaintiff), we consider whether the negligence of the lawyers Cook Brown, LLP and Ronald W. Brown (defendants) caused plaintiff's damages. M&M, a family-owned business engaged in the installation of flooring materials, sued its former labor lawyers Cook Brown, LLP and Ronald W. Brown for malpractice after it followed defendants' advice to repudiate its collective bargaining relationship with a union and was subsequently assessed pension withdrawal liability of over

\$3.5 million under certain provisions of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1301 et seq.) added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) (Pub. L. No. 96-364, § 1 (Sept. 26, 1980) 94 Stat. 1208; 29 U.S.C. §§ 1381, 1391.) Defendants sought summary judgment on the ground plaintiff could not establish the elements of causation or damages. The trial court granted summary judgment. Plaintiff appeals, contending the trial court erred both procedurally and substantively in granting defendants' motion. We shall affirm the judgment.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### **The Events Pre-Litigation**

Simas Floor Company (Simas Floor) is a corporation in the business of selling and installing flooring material (hardwood, vinyl, carpet and tile) primarily to new home builders. It is owned and managed by certain members of the Simas family. M&M is a corporation also owned and run by several members of the Simas family. M&M is engaged exclusively in the installation of flooring material for Simas Floor. Part of the business plan for Simas Floor and M&M was for Simas Floor to operate as a nonunion shop and for M&M to operate as a union shop. Under this plan, Simas Floor has needed access to both union and nonunion labor (through its own employees, M&M or independent subcontractors) for installation of the flooring it sells.

M&M was a signatory to a collective bargaining agreement (CBA) with the Carpet Resilient Floor Covering and Sign Workers Local 1237 (Local 1237) through May 2004 (hereafter referred to as the old CBA). A few days before the expiration of the old CBA, District Council 16 of the International Union of Painters and Allied Trades (District Council 16), which is affiliated with Local 1237 (together the Union), presented M&M with a new CBA to be effective in June 2004. Mark Simas, shareholder and president of both M&M and Simas Floor,<sup>1</sup> asked defendant Brown to review the new CBA for provisions that might purport to bind Simas Floor to its terms. Brown advised Simas that the new CBA contained a clause that, if signed by M&M, would pose a risk that the Union could claim Simas Floor was also bound to the new CBA by virtue of the close ownership and management relationship between Simas Floor and M&M. If Simas Floor was bound to the new CBA, Simas Floor could additionally be held to pay union benefits for work performed by its nonunion subcontractors. Brown advised Simas to sit down with the Union to try to negotiate an amendment to the new CBA stating Simas Floor would not be bound to the CBA, similar to an agreement M&M had reached with another union.

Simas sought such an amendment, but the Union would not agree to exclude Simas Floor from the coverage of the new CBA.

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<sup>1</sup> References to Simas hereafter are to Mark Simas. Other Simas family members will be referred to by their first and last name.

The Union called a strike against M&M. M&M sent a letter prepared by Brown to the Union repudiating its collective bargaining relationship with the Union.

In October 2004, M&M was informed that it had incurred withdrawal liability to the Resilient Floor Covering Pension Fund (Pension Fund) for unfunded vested benefits pursuant to the MPPAA (29 U.S.C. §§ 1381, 1391) and that it was required to make payments of \$43,945.52 per quarter for 80 quarters with the first payment due within 60 days.

Thereafter, between December 2004 and February 2005, Simas continued to communicate with representatives of the Union to explore whether the Union would accept a CBA from M&M that did not bind Simas Floor. No agreement was reached. Simas Floor changed law firms with respect to the ongoing issues with the Union.

### **The Malpractice Litigation**

In July 2005, M&M filed this legal malpractice action against defendants, generally alleging defendants committed legal malpractice "resulting in the imposition of withdrawal liability."

Defendants sought summary judgment on the grounds that plaintiff could not establish the elements of causation and damages for its malpractice action.<sup>2</sup> (*Viner v. Sweet* (2003) 30

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<sup>2</sup> The summary judgment motion did not address the issues of duty or breach of duty, although it noted both were contested issues.

Cal.4th 1232, 1244 ["a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result"].) We find it necessary to describe defendants' motion and plaintiff's response in some detail to aid understanding of the parties' positions in the trial court and on appeal.

### **Defendants' Motion For Summary Judgment**

In their memorandum of points and authorities in support of their summary judgment motion, defendants generally argued that their conduct did not actually cause the imposition of withdrawal liability. Defendants claimed that even if they had warned M&M that repudiation of its collective bargaining relationship with the Union risked possible withdrawal liability, that warning would have been unheeded. Defendants assert that M&M would not have signed the new CBA that bound both Simas Floor and M&M to the Union because the cost of having both companies bound to the Union's CBA, would far exceed the amount of withdrawal liability imposed. Simas Floor was much better off paying the withdrawal liability. Addressing plaintiff's claim that with adequate warning of the withdrawal liability, M&M could have devised an exit strategy to avoid incurring the withdrawal liability, defendants contended plaintiff could not "prove there was *an available and acceptable*

exit strategy that would have eliminated withdrawal liability.”  
(Italics added.)

In its points and authorities, extensively citing, and in some cases directly quoting, evidence referenced in its statement of undisputed facts (SUF), defendants countered plaintiff’s exit strategies. Defendants argued the Simas family could have shut Simas Floor and M&M down to avoid the withdrawal liability, but they have not done so, “because their operation is phenomenally profitable, earning the family millions of dollars per year.” Defendants noted the family has not sold M&M to avoid the withdrawal liability because M&M exists to house the family business’s union employees and contracts exclusively with Simas Floor. Defendants also argued the Simas family was presumably aware “that Congress closed the door to sales designed to avoid withdrawal liability.” Specifically, defendants argued the MPPAA precluded selling or restructuring companies for the purpose of avoiding withdrawal liability. (29 U.S.C. § 1392, subd. (c); *Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Rentar Industries, Inc.* (7th Cir. 1991) 951 F.2d 152, 155, fn. 1.)

Factually, defendants noted the family has not separated the two companies to avoid withdrawal liability since this would also defeat the purpose of M&M as housing the family business’s union employees. Defendants claimed a delay in repudiation

would not have benefited M&M, noting that while no withdrawal liability is imposed on an employer that ceases contributions to a pension plan during a bona fide labor dispute, declaring such a labor dispute would not have helped M&M. Under such a labor dispute, M&M would have remained liable for interim withdrawal liability payments, and unless the dispute resulted in a new agreement and resumption of contributions to the Pension Fund, withdrawal liability would relate back to when the dispute arose. (29 U.S.C. § 1398, subd. (2); *Central States, Southeast and Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.* (7th Cir. 1992) 960 F.2d 1339, 1341; *I.A.M. National Pension Fund, Plan A, A Benefits v. Fraser Shipyards, Inc.* (D.D.C. 1988) 698 F.Supp. 326, 331.) Defendants also claimed a delay in repudiation would have increased the amount of calculated withdrawal liability and might have increased the risk of binding Simas Floor to the new CBA by its conduct.

Defendants' extensive arguments and cited evidence in support of their motion was out of sync with their actual SUF. The actual SUF provided only a very abbreviated history of: the two Simas family businesses; the dispute with the Union over the new CBA; M&M's repudiation of the collective bargaining relationship; and the imposition of withdrawal liability. Defendants' SUF stated generally that Simas continued to communicate with representatives of the Union after imposition of the withdrawal liability in an unsuccessful effort to get the

Union to accept a contract from M&M that did not bind Simas Floor. According to defendants' SUF, without such an agreement, the principals of Simas Floor and M&M concluded it was in their best interest for M&M to pay the withdrawal liability rather than have Simas Floor bound to the new CBA. Defendants' SUF also stated the amount of the withdrawal liability would have stayed the same no matter when in 2004 M&M withdrew from the union and would not have decreased had M&M withdrawn in 2005 or 2006. Defendants stated Simas Floor had net income for 2005 of \$4,523,077, while M&M had net income for the same period of \$-45,461.

As already noted, the evidence cited in the points and authorities in support of the facts in defendants' SUF went beyond the facts set forth in the SUF and addressed the broader claims regarding exit strategies set forth in defendants' argument.

The evidence cited showed that, after M&M was notified of the withdrawal liability, the Simas family looked into what would be required to separate the two companies. Simas wrote a letter to the Union asking what kind of connection M&M could have with Simas Floor without the Union considering them both to be bound by the new CBA. Simas asked if the family could still be owners as long as they were not involved in running M&M. Simas noted the Union's response, through its representative Vince Echeverria, was that there could be "zero connection"

between Simas Floor and M&M without binding the two. Doug Christopher, director of service for District Council 16 of the Union, told Simas that if the same people were involved in either management, control or ownership, the arrangement would be unacceptable to the Union. Simas also investigated what would be required for separation of the two companies by going through a worksheet provided by defendant Brown.

When asked whether he ultimately made the decision that separation was not feasible, Simas responded that "[i]t was very exhausting, yes." According to Simas, it was just too much work and it was possible the withdrawal liability might still follow Simas Floor. Separation might not accomplish anything. The deposition testimony of Craig Simas supported that of Simas. Craig Simas testified the family concluded opening a separate business would not work due to the hard stand of the Union. "[I]t would not be beneficial to our business."

The evidence cited in the points and authorities by defendants also reflected that Simas was asked about a note he had made at the bottom of the letter to the Union that stated: "I did not ask the question that if M&M sold the business, would the withdrawal liability . . . cease. Maybe we want to do this in a follow up letter." Simas did not recall there being any such follow up letter. Simas testified at his deposition that M&M's only source of business was Simas Floor. If M&M was sold, it would have to be to someone outside of Simas Floor. Simas

did not consider to what extent Simas Floor would continue business with such a new company. He looked into the sale of M&M in general conversation with his installation crews, but not formally. One of the representatives for the Union, Echeverria, expressed an interest in purchasing M&M. Echeverria was aware of the withdrawal liability and knew that it would follow M&M, but that "the penalty would hibernate" if M&M resumed contributions to the Pension Fund. Echeverria later told Simas he could not put the deal together.

Asked what he would have done if he had known repudiation would result in withdrawal liability, Simas testified he would have looked in more detail at the options of selling M&M, splitting M&M off, or postponing negotiations to see if the liability could have been lessened. He admitted it was speculative whether the situation would have been different back at the time M&M repudiated the collective bargaining relationship from when the family looked at the options after the imposition of the liability. Simas stated that the family has never marketed M&M and that selling might not have prevented the Union from going after Simas Floor for secondary withdrawal liability.

**Plaintiff's Opposition To Defendants' Motion For Summary Judgment**

M&M opposed defendants' motion for summary judgment on both procedural and substantive grounds.

M&M first complained, correctly, that many of the "facts" stated in defendants' points and authorities were not stated in defendants' SUF. M&M argued that such facts were, as a result, inadmissible evidence that could not be considered by the court, which in turn meant the defendants had not met their burden of proof on summary judgment.

Substantively, M&M argued the declaration of its expert witness, Harry Finkle, submitted in opposition to defendants' motion, established triable issues of fact existed "that 'but for' defendants' failure to advise plaintiff of its options such as restructuring or selling M&M, plaintiff would be in a better position today and would not be paying withdrawal liability payments totaling over 3 million dollars." In his declaration, Finkle expressed the opinion that there were options available to M&M to lawfully avoid entering into the new CBA binding Simas Floor. One such option was sale of M&M to a bona fide third party who would then sign the new CBA. In Finkle's opinion, "there is a high likelihood M&M . . . could easily have [been] sold, and would have been sold, had the business been marketed prior to the imposition of withdrawal liability." According to Finkle, M&M would have been a very attractive business for purchase prior to imposition of withdrawal liability because of the high likelihood of being first in line to garner substantial, profitable business from Simas Floor. Finkle also opined that M&M could have chosen a new management arrangement,

changed officers, and elected new officers that were not in the Simas family to establish M&M as a separate employer from Simas Floor so that the new CBA would not bind Simas Floor. Finkle stated he had reviewed the deposition of Christopher and that Christopher had made the Union's position clear that Simas Floor would not be bound by M&M's execution of the new CBA if M&M changed its management. Plaintiff argued that sale or restructure of M&M was legally permissible under the MPPAA because prior to repudiation M&M was not trying to avoid withdrawal liability. It was just trying to avoid having Simas Floor bound to the new CBA.

Plaintiff's opposition was set forth in points and authorities, a response to defendants' SUF and a separate statement of disputed facts (SSDF) supported by the Finkle declaration and portions of deposition testimony.

### **Defendants' Reply**

In their reply points and authorities, defendants disputed the claim that their initial points and authorities contained facts not set forth in their SUF, claiming the facts were supported by the evidence they cited in the SUF.

As to the substantive claims of plaintiff, defendants argued plaintiff had failed to create a triable issue of fact. According to defendants, "[p]laintiff's effort fails for multiple reasons: (1) its claim that it simply could have changed officers and management to avoid both binding Simas

Floor Co. and withdrawal liability is based solely upon an alleged expert witness's alleged 'interpretation' of the testimony of witnesses, an interpretation that directly contradicts the testimony of those witnesses; (2) plaintiff does not offer the testimony of its own principals in support of its position because that testimony contradicts its expert's assertions; and (3) its claim that it could have sold M&M to avoid binding Simas Floor Co. and also to avoid withdrawal liability is not supported by one specific fact, but again only by the unsupported speculative opinion of an expert with no apparent expertise in marketing or selling businesses such as M&M. Moreover, the claim ignores applicable statutes, case law and contract language all stating that the Simas Family Enterprise was not permitted to sell M&M in order to avoid the payment of withdrawal liability." (Original record citation and emphasis omitted.) Addressing this last point, defendants for the first time pointed to a specific paragraph of the old CBA (section 16), as well as the same provision in the new CBA (section 31.3), that expressly prohibited the sale, assignment or transfer of all or any part of a business for the purpose of evading or avoiding the CBA. Both CBAs had been attached to defendants' SUF in support of the undisputed facts that M&M had been a signatory of the old CBA and that the Union had presented M&M with the new CBA to take effect after the expiration of the old agreement. The specific provisions of the CBAs referenced

in defendants' reply had not been previously highlighted or argued by the defendants.

Defendants filed a separate document objecting both generally and specifically to the declaration of plaintiff's expert, Finkle. With respect to the claimed options M&M had to avoid withdrawal liability, defendants objected to Finkle's opinions as speculative, lacking foundation, and contrary to the law and facts in evidence. Among other things, defendants claimed the deposition of Christopher, the director of service for District Council 16, did not support Finkle's statement that the Union only required a change in M&M management for Simas Floor not to be bound to the new CBA. To the contrary Christopher testified there could be no connection between the two companies or the Union would consider Simas Floor to be bound.

In their reply to plaintiff's SSDF, defendants objected to nearly every statement of fact. The only facts that defendants agreed were "undisputed" were that the business plan of Simas Floor and M&M was to move all union workers to M&M and have Simas Floor be nonunion and the nature of Christopher's position with the Union.

### **The Trial Court's Ruling**

The relevant portion of the trial court's ruling granting summary judgment is as follows:

"Defendants move for summary judgment of the legal malpractice claim on the grounds that plaintiff cannot establish either proximate cause or damages, based upon defendants' failure to warn plaintiffs of this liability so that they could plan an 'exit strategy' to avoid liability.

"Just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result. The purpose of the 'but for' test is to safeguard against speculative and conjectural claims. *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244.

"Moving parties assert that there was no available and acceptable exit strategy that would have eliminated withdrawal liability. Simas Floor could have shut its doors, but they have not done so because the operation is very profitable.

"Under the Multi-employer Pension Plan Amendments Act ('MPPAA'), if an employer withdraws from a plan, it may incur withdrawal liability based upon the amount of unfunded vested pension benefits. 29 U.S.C. sections 1381(a), 1391. Where two companies are related through common ownership ('double breasting') with one of the companies performing union work and the other performing the same work with non-union employees, pension law treats the two entities as a single employer for the MPPAA.

"M&M is no longer a signatory with the Union since the Union has consistently taken the position that for M&M to be bound, Simas Floor must also be bound by the collective bargaining agreement, and Simas is unwilling to be bound. Thus plaintiffs cannot establish that but for the defendants' negligence they would have been in any different position that [sic] they are in today.

"In opposition, plaintiffs submit the declaration of their expert Harry Finkle, to opine that M&M had several options: it could have been sold to a bona fide third party, prior to the imposition of withdrawal liability. Alternatively, it could have set up [a] new management arrangement for M&M, lawfully establishing the company as a separate employer, so it would not have been deemed to be a double breasted operation with Simas Floor. However, the failure to pursue either of these alternatives prior to the imposition of withdrawal liability made them no longer viable.

"In reply, defendants assert that the Master Agreement [old CBA], to which M&M was a signatory, expressly prohibited the sale, assignment or transfer of M&M to avoid the collective bargaining agreement.

"Based upon the express contract language prohibiting the proposed 'options', the Court finds that the expert opinion offered in opposition is purely speculative. The motion for

summary judgment is granted, as no material facts are in dispute.”

The trial court additionally sustained many of defendants’ objections to the Finkle declaration, including the objections to his opinions regarding the available exit options of selling or restructuring M&M.<sup>3</sup>

M&M filed a motion for reconsideration contending the trial court erred in granting summary judgment only because it considered, in violation of plaintiff’s due process rights, the argument made by defendants for the first time in their reply brief that the express contract language in the CBA prohibited the sale, transfer or assignment of M&M to avoid withdrawal liability. The trial court denied the motion.

## **DISCUSSION**

### **I.**

#### **Standard of Review**

The summary judgment procedure and standard of review are well-established, but bear repeating. “Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the

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<sup>3</sup> The trial court did not address plaintiff’s procedural objection that many of the facts, stated in defendants’ points and authorities, were not stated in defendants’ SUF.

action or proceeding.” (Code Civ. Proc., § 437c, subd. (a).)<sup>4</sup>

The court shall grant the motion for summary judgment “if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (§ 437c, subd. (c).)

A defendant moving for summary judgment has met its burden of showing a cause of action has no merit if it has shown one or more elements of that cause of action cannot be established or that there is a complete defense to that cause of action.

(§ 437c, subd. (p)(2).) A defendant has two means of carrying its burden on a motion for summary judgment. The defendant may rely on “the tried and true technique of negating (‘disproving’) an essential element of the plaintiff’s cause of action.

[Citation.]” (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1598.) Or, “[t]he defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. [Citation.]” (*Ibid.*; accord, *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590.)

Once the defendant has met its burden, “the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not

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<sup>4</sup> Hereafter, undesignated statutory references are to the Code of Civil Procedure.

rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (§ 437c, subd. (p)(2).)

In making and opposing motions for summary judgment, the parties bear the burden of including all material facts in their separate statements, and citing to evidence to support those facts. (§ 437c, subd. (b)(1) & (3).) "Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for . . . summary judgment to determine quickly and efficiently whether material facts are disputed." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335 (*United Community Church*).) "[I]t is no answer to say the facts set out in the supporting evidence or memoranda of points and authorities are sufficient." (*Ibid.*) Thus, some courts have accepted as the "'Golden Rule of Summary Adjudication: if [the fact] is not set forth in the separate statement, [the fact] *does not exist*.'" (*Id.* at p. 337; see *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 31.)

Nevertheless, more recent case law recognizes such "Golden Rule" is tempered by section 437c, subdivision (b), which speaks in terms of the trial court's discretion to deny a motion for

summary judgment for failure to comply with the requirement of a separate statement. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 437-438; *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1480-1481; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315 (*San Diego Watercrafts*).) “[T]he absolute prohibition on consideration of nonreferenced evidence is unsupported by the statute.” (*San Diego Watercrafts, supra*, at p. 311.) “The statute is permissive, not mandatory: ‘[f]acts stated elsewhere [than in the separate statement] need not be considered by the court [citation] . . . .’ [Citations.] Whether to consider evidence not referenced in the moving party’s separate statement rests with the sound discretion of the trial court.” (*Id.* at pp. 315-316.)

“On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We apply the same three-step analysis used by the trial court by: (1) identifying the issues framed by the pleadings; (2) determining whether the moving party has negated the opponent’s claims; and (3) determining whether the opposition has demonstrated the existence of a triable, material issue of fact. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.) We review the

trial court's ruling, not its rationale. (*Ojavan Investors v. Cal. Coastal Com.* (1997) 54 Cal.App.4th 373, 385.) Because of this "and because we 'must affirm the judgment if it is supportable on another basis which establishes [the moving party] must prevail as a matter of law' [citation], we undoubtedly have the same discretion as the trial court to consider evidence not referenced in the moving party's separate statement in determining whether summary judgment was proper." (*Fenn v. Sherriff, supra*, 109 Cal.App.4th at p. 1481.)

"The court in *San Diego Watercrafts, Inc.*, suggested factors that should be considered in deciding whether to look beyond the moving party's statement of undisputed facts. Where the facts before the court are 'relatively simple,' the evidence that compels affirming the summary judgment was 'clearly called to the attention of court and counsel,' and the moving party's entitlement to judgment in its favor is 'obvious to the court and to the [opposing] party,' it would be an abuse of discretion to reverse a summary judgment 'because of a mere procedural failure' by the moving party in failing to include the dispositive fact in its separate statement. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra*, 102 Cal.App.4th at p. 316.) Of course, '[i]n exercising its discretion whether or not to consider evidence undisclosed in the separate statement, the court should also consider due process implications noted in *United Community Church.*' (*Ibid.*) '[D]ue process requires a

party be fully advised of the issues to be addressed and be given adequate notice of what facts it must rebut in order to prevail.' (*Ibid.*)" (*Fenn v. Sherriff, supra*, 109 Cal.App.4th at p. 1481.)

## II.

### A Summary Of The Parties' Arguments On Appeal

#### Procedural Arguments

M&M contends there were two procedural errors in the trial court. First, the trial court broke the "Golden Rule" of summary judgment (*United Community Church, supra*, 231 Cal.App.3d 327, 337) by considering the facts set forth in defendants' moving and reply points and authorities and that such error violated plaintiff's due process rights. M&M contends this court can consider only the facts set forth in defendants' *SUF* on appeal. Second, M&M claims the trial court improperly based its ruling on an erroneous interpretation of the contract language in the CBA that was never referenced until defendants' reply brief.<sup>5</sup>

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<sup>5</sup> The contract language of the old CBA provides: "No Employer shall sell, assign or otherwise transfer any or all of his business for the purpose of avoiding or evading this Agreement." M&M claims that if the contract language had been argued in defendant's initial papers, M&M would have pointed out that the language prohibits only M&M from avoiding or evading the agreement, not Simas Floor--who is not the "Employer" referenced by the language. According to M&M, "M&M or any part of M&M could be sold, assigned or transferred for any reason, except if M&M's purpose was for M&M to avoid or evade the agreement. A

Defendants claim M&M's broader procedural objection to the facts stated in its points and authorities lacks merit because defendants "were merely presenting proper argument based on facts or inferences interpreted from facts referenced in the separate statement and/or the cited evidence supporting those facts." Defendants point us to the more recent law regarding a court's discretion to consider all evidence set forth in the moving papers. (*King v. United Parcel Service, Inc, supra*, 152 Cal.App.4th 426, 437-438; *San Diego Watercrafts, supra*, 102 Cal.App.4th 308, 316.) Defendants also respond that the trial court's ruling was not based entirely on the contract provision in the old CBA, that the trial court relied on the provision only to find the Finkle declaration speculative, and that M&M's argument is moot because the trial court also issued evidentiary rulings sustaining many of defendants' objections to the Finkle declaration, which plaintiff does not challenge. Defendants claim M&M's procedural argument is also without merit for the following reasons: no new evidence was cited in defendants' reply; the existence of the CBAs were the subject of two undisputed material facts in defendants' SUF; the contract language was discussed at the deposition of Simas; the contract

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sale, transfer or assignment of M&M would not have resulted in M&M avoiding or evading the agreement. Because regardless of who purchased M&M, M&M (the company) would continue operating and would continue as a union shop." (Emphasis in original.) M&M argues the same would be true if M&M had set up a new management arrangement and restructured the company.

language is consistent with federal law cited in defendant's moving points and authorities; and the contract was reviewed by M&M's expert, Finkle.

### **Substantive Arguments**

Substantively, M&M contends that both sale and restructuring (with continued pension contributions) are specific statutory exemptions to withdrawal liability under the MPPAA that were legally viable alternatives to withdrawal for M&M. (29 U.S.C. §§ 1384, 1398.)<sup>6</sup> Utilizing these exceptions,

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<sup>6</sup> Section 1384 provides in relevant part: "(a)(1) A complete or partial *withdrawal* of an employer . . . under this section does *not occur solely because*, as a result of a *bona fide, arm's-length sale of assets to an unrelated party* . . . , the seller ceases covered operations or ceases to have an obligation to contribute for such operations, *if--* [¶] (A) the purchaser has an obligation to contribute to the plan . . . for substantially the same number of contribution base units . . . ; [¶] (B) the purchaser provides to the plan for a period of 5 plan years . . . , a bond . . . or an amount held in escrow . . . , in an amount [determined by the greater of two specified formulas], . . . [¶] . . . [¶] which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due . . . ; and [¶] (C) the contract for sale provides that, if the purchaser withdraws . . . , during such first 5 plan years, the seller is secondarily liable for any withdrawal liability . . . ." (29 U.S.C. § 1384, subd. (a)(1), italics added.)

Section 1398 provides in relevant part: "Notwithstanding any other provision of this part, *an employer shall not be considered to have withdrawn from a plan solely because--* [¶] (1) an employer ceases to exist by reason of-- [¶] (A) a *change in corporate structure* described in section [1369(b) of this title] . . . , *if the change causes no interruption in employer contributions or obligations to contribute* under the plan . . . ." (29 U.S.C. § 1398, italics added.)

M&M contends there would have been no withdrawal liability triggered because there would have been no withdrawal. (29 U.S.C. § 1383.) Additionally, M&M claims there are circumstances in which withdrawal does occur as a result of a sale or restructure, but withdrawal liability can be lawfully avoided so long as avoiding or evading is not a principal purpose of the sale or restructure. (29 U.S.C. § 1392, subd. (c).)<sup>7</sup>

M&M argues the deposition testimony of Christopher confirms its expert's declaration (the Finkle declaration) that M&M could have been restructured by changing shareholders, management, officers, and directors, while keeping shared accounting employees and equipment, without binding Simas Floor to the new CBA. M&M also points to Finkle's various opinions regarding the availability of sale and restructuring options prior to the imposition of withdrawal liability. M&M claims factually M&M could have been restructured or sold, relying again on the Finkle declaration.<sup>8</sup>

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<sup>7</sup> Section 1392, subdivision (c), provides: "If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction."

<sup>8</sup> M&M fails to acknowledge the trial court sustained defendants' objections to Finkle's opinions. M&M does not argue the trial court erred in sustaining the objections.

Defendants disagree with M&M's claims that withdrawal liability could have been avoided under the provisions of the MPPAA and CBA without binding Simas Floor to the new CBA. Defendants also assert there was no evidence to support M&M's claim that had it known of the withdrawal liability, it could or would have sold or restructured to avoid withdrawal liability.

We agree with the last portion of defendants' final claim and find it dispositive. As we will explain, no triable issue of material fact exists that the Simas family *would* have sold or restructured M&M at the time the dispute with the Union over the new CBA arose, even assuming for purposes of argument that M&M *could* have legally been sold or restructured so as to bring it within the exceptions to imposition of withdrawal liability.<sup>9</sup> (29 U.S.C. §§ 1384, 1398.) Therefore, the trial court did not err in granting summary judgment.

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<sup>9</sup> Prior to oral argument, defendants filed a motion for judicial notice requesting notice of the judgment, the order granting summary judgment, and various papers filed by the parties in connection with the summary judgment in a federal case entitled *Resilient Floor Covering Pension Fund v. M & M Installation, Inc.* (N.D.Cal. 2009, No. C08-5561 BZ) 2009 U.S. Dist. LEXIS 72793. We find such materials to be unnecessary to the issue we find dispositive on appeal and on that basis, we deny the motion.

### III.

#### **Summary Judgment Was Properly Granted Because, Assuming Selling Or Restructuring Were Legally Available Options, The Evidence Shows M&M Would Not Have Taken Those Options**

“‘When a business transaction goes awry, a natural target of the disappointed principals is the attorneys who arranged or advised the deal. Clients predictably attempt to shift some part of the loss and disappointment of a deal that goes sour onto the shoulders of persons who were responsible for the underlying legal work. Before the loss can be shifted, however, the client has an initial hurdle to clear. It must be shown that the loss suffered was in fact caused by the alleged attorney malpractice. It is far too easy to make the legal advisor a scapegoat for a variety of business misjudgments unless the courts pay close attention to the cause in fact element, and deny recovery where the unfavorable outcome was likely to occur anyway . . . .’” (*Viner v. Sweet, supra*, 30 Cal.4th at pp. 1240-1241, italics omitted.) Therefore, “a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result.” (*Id.* at p. 1244.)

Here the negligence alleged by M&M was defendants’ failure to advise M&M that a consequence of its repudiation of its collective bargaining relationship with the Union would be the imposition of withdrawal liability and to advise M&M of its

options.<sup>10</sup> To prove causation, M&M must show that if it had been advised by defendants of the withdrawal liability and its options, it would have done something different resulting in a more favorable outcome. (*Viner v. Sweet, supra*, 30 Cal.4th at p. 1242 [“the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent”].)

To meet their burden on the motion for summary judgment brought on the basis of a lack of causation, defendants had to either disprove causation or, relying on factually insufficient discovery responses by M&M, show that M&M cannot establish causation. (*Brantley v. Pisaro, supra*, 42 Cal.App.4th at p. 1598; *Union Bank v. Superior Court, supra*, 31 Cal.App.4th 573, 590.)

The evidence submitted to the trial court in support of defendants’ SUF and argued in defendants’ points and authorities was sufficient to meet such burden. The evidence showed: (1) the Union was unwilling at all times to allow M&M as currently owned and structured to sign the new CBA without Simas Floor also being bound by its terms; (2) the Simas family concluded it was a better business decision to pay the assessed withdrawal liability than to sign the new CBA and have Simas Floor bound by

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<sup>10</sup> On appeal M&M argues only the options of sale or restructuring of M&M. M&M has apparently abandoned the claim that the option of delay by declaring a labor dispute, which was discussed at the trial court level, was a viable option that would have benefitted it. Therefore, we need not discuss such option.

its terms; (3) that after the imposition of withdrawal liability, the Simas family investigated restructuring M&M and concluded, in light of the Union's hard stand requiring a complete change of ownership, control and management so that there was zero relationship between Simas Floor and M&M, that restructuring was not feasible, would not be beneficial to their business, and might still carry a potential for withdrawal liability; (4) that after imposition of withdrawal liability, the family considered sale of M&M to someone outside the Simas family (an unrelated third party), but did not consider what the relationship of Simas Floor would be to such new company and did not follow through with any formal efforts to market M&M; and (5) the family was concerned a sale might not prevent the Union from still going after Simas Floor for any withdrawal liability. Simas testified he would have "looked in more detail at" these options if he had known about the withdrawal liability at the time of the dispute with the Union in May/June 2004, but did not say he would have sold or restructured M&M. He admitted it was speculative whether the circumstances would have been different at the time of repudiation from when the family looked at the options after the imposition of liability. There is no evidence that the circumstances would have been different pre- or post-imposition of withdrawal liability. For example, there was no evidence the Union's position was or would have been any different if the options had been broached prior to repudiation.

There is no evidence that restructuring would have been less work or that restructuring or sale of M&M would have better fit the Simas family business plan before repudiation. It was undisputed that the family's business plan was to have Simas Floor be a nonunion shop and M&M be a union shop so that Simas Floor would have needed access to both nonunion and union installers. The reasonable inferences from the evidence strongly suggest the Simas family wanted to keep both businesses.

Although these facts were not set out as undisputed facts in defendants' SUF (and it is not clear whether the trial court considered them), we will exercise our discretion on appeal to consider them. (*Fenn v. Sherriff, supra*, 109 Cal.App.4th at p. 1481.) The issue of whether the Simas family *would* have sold or restructured M&M does not involve consideration of all the numerous exhibits submitted with defendants' motion for summary judgment, but a relatively small portion of the record. The facts going to this narrow issue are "'relatively simple.'" (*Fenn v. Sherriff, supra*, at p. 1481; *San Diego Watercrafts, supra*, 102 Cal.App.4th at p. 316.) Critically, these facts were "'called to the attention of court and counsel'" through defendants' moving and reply papers. (*Fenn v. Sherriff, supra*, at p. 1481; *San Diego Watercrafts, supra*, at p. 316.) Plaintiff had notice of these facts, and had an opportunity to submit admissible evidence to address them. We conclude that under

these circumstances, consideration of the evidence does not violate M&M's due process rights. (*Fenn v. Sherriff, supra*, at p. 1481; *San Diego Watercrafts, supra*, at p. 316.)

Indeed, M&M attempted to address defendants' claims in its response to defendants' motion, but not by the direct method of submitting a declaration of Simas (or any other member of the Simas family) that the family would have sold or restructured M&M if they had been advised of the withdrawal liability. Rather, M&M submitted the declaration of Finkle, who opined that M&M "could easily have [been] sold, and would have been sold, had the business been marketed prior to the imposition of withdrawal liability." Finkle also provided his opinions regarding the likelihood of restructuring. The trial court, however, sustained defendants' objections to these portions of Finkle's declaration and M&M has wisely not argued on appeal that the trial court erred. Thus, there is no admissible evidence that establishes a triable issue of material fact on this point.

On this narrow issue of whether the family would have exercised the option of either sale or restructuring of M&M, assuming they were legally viable, defendants' "entitlement to judgment in [their] favor is 'obvious to the court and to the [opposing] party.'" (*Fenn v. Sherriff, supra*, 109 Cal.App.4th at p. 1481; accord *San Diego Watercrafts, supra*, 102 Cal.App.4th at p. 316.) The state of the evidence before the trial court

and this court shows the Simas family wanted to remain in control and ownership of M&M. The Simas family was not willing to divest themselves of such control and ownership to restructure or sell M&M because the profitability of their business plan, which linked Simas Floor with M&M, outweighed the potential for a withdrawal liability claim. And that any restructure or sale of M&M might still not resolve the possibility of secondary withdrawal liability, a concern expressed by Simas post repudiation.

To summarize, defendants contended M&M could not prove there was any legally valid and factually available alternative that the Simas family would have pursued had they been advised by defendants that repudiation carried a potential consequence of withdrawal liability. Therefore, M&M could not prove that “*but for*” defendants’ alleged negligence it is more likely than not that M&M would have been better off. (*Viner v. Sweet*, *supra*, 30 Cal.4th 1232, 1244.) Defendants met their burden on summary judgment, shifting the burden to plaintiff to establish a triable issue of material fact regarding causation. Plaintiff did not meet its burden. The trial court properly granted summary judgment on the basis of a lack of causation.

**DISPOSITION**

The judgment is affirmed. Costs on appeal are awarded to respondents. (Cal. Rules of Court, rule 8.278(a).)

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CANTIL-SAKAUYE, J.

We concur:

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RAYE, Acting P. J.

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ROBIE, J.